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December 18, 2006

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex K)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: TSR Prerecorded Call Prohibition and Call Abandonment Standard
Modification, Project No. R411001

Dear Ladies and Gentlemen:

This letter is written in response to the FTC's request for public comments in reference to proposed amendments to the Telemarketing Sales Rule ("TSR"). Call Command, Inc. is in the business of voice marketing, providing its customers (such as automobile dealers) with technology for sending prerecorded messages. Call Command also makes available various other medium for customer communications, including without limitation communication through text messages and e-mail. A typical use of Call Command's technology includes sending of prerecorded calls for notifications of product recalls such as automobile defects and reminders of scheduled appointments, as well as targeted marketing campaigns sent to customers with whom there exists an established business relationship. References in this letter to "consumers" generally refers to the retail customers of Call Command's automobile dealer clients.

Call Command is recognized as a market leader in compliance and service and fully intends to continue to be a leader in compliance regardless of the outcome of the proposed amendments to the TSR. Call Command welcomes the spirit and intent of the proposed modifications but asks the FTC to clarify its position in some cases and to reconsider the means in which changes will be made in other cases. The purpose of this letter is to provide public comment in response to the TSR amendment proposals and to respectfully request the FTC to:

1. Reconsider the proposed prerecorded telemarketing call prohibition;
2. Provide guidance on the difference between a "telemarketing" call and an "informational" call;
3. Provide guidance on the manner of obtaining "express consent" if the proposed amendment to the call abandonment safe harbor is adopted; and

4. If the proposed “express consent” requirement in Section 310.4(b)(1)(v) is adopted:

(a) amend the call abandonment prohibition in Section 310.4(b)(1)(iv) to clarify that the prohibition in 310.4(b)(1)(iv) does not apply to calls where “express consent” is obtained; and

(b) provide industry with at least 18 months to obtain the express consent of its customers to receive prerecorded telemarketing calls due to the substantial burden such a new compliance requirement imposes on industry and forebear enforcement of the call abandonment restrictions with respect to such calls.

1. Reconsider the proposed prerecorded telemarketing call prohibition.

Call Command’s customers find substantial value in sending targeted prerecorded voice messages to consumers with whom they have an existing business relationship. The return on investment to these customers is significant (several hundred percent) while at the same time placing minimal imposition on customer privacy rights. The reason is that customers appreciate receiving calls informing them of important information (such as time for servicing or the availability of new products). Only 1.14% of calls sent through the use of Call Command’s technology since inception has resulted in requests by consumers to opt out of receiving these calls.

Call Command believes that the reason for the substantially small amount of opt outs is that it only sends information in compliance with applicable laws. Consumers have come to depend on and react favorably toward receiving these calls. Consumers are not receiving information that they prefer not to receive, and Call Command strictly limits calls to persons who legally can receive the calls. Unfortunately, there are other companies in the telemarketing industry who send calls completely blind to the TSR, the Telephone Consumer Protection Act and other applicable laws. These are the same types of companies that Call Command finds itself sending cease and desist letters for infringement of Call Command’s good name. These noncompliant companies do in fact offend the privacy rights of consumers, and these offended consumers are quick to respond as to their perceived annoyance of prerecorded messages. Those companies that are compliant do not receive regular customer complaints or frequent requests not to receive further calls.

Call Command respectfully request the FTC to use less burdensome means than an absolute prohibition on prerecorded telemarketing calls to accomplish its goal of consumer protection. The recommended goal is to find a middle ground that is in proportion to the interest of both consumers and industry.

Call Command asks the FTC to reconsider a solution that accomplishes the objectives of the FTC and is in fact narrowly tailored to satisfy those objectives. That solution is to simply require all prerecorded telemarketing calls to include an opt out mechanism such as a push

button to make a do not call request (i.e., as VMBC proposed). Call Command believes that this is in fact just as easy as delivering a do not call ("DNC") request directly to a live operator. It is our position and experience that most consumers feel better about leaving the DNC request on a recorded message or otherwise electronically than they do facing a potentially uncomfortable discussion with a live sales agent. The burden, if any, placed on a consumer to push a button and make a DNC request compared to the substantial harm to industry that would result from an absolute prohibition on prerecorded telemarketing calls is insignificant.

Another alternative that is narrowly tailored and meets the goals of the FTC that Call Command asks the FTC to consider is to modify DNC registry listings to provide consumers the right to opt out of calls from businesses in which they have an existing business relationship, political calls, etc. Those persons already on the list could either submit a new registration with any specific opt outs or they could wait until their current registration expires and update the preferences with their new registration. The FTC's express consent proposal would still apply for specific situations where a consumer prefers to receive calls that otherwise would cause a violation of the DNC registry.

The FTC indicated in its recent Denial of Petition for Proposed Rulemaking that "the proposed amendment explicitly limiting the use of prerecorded telemarketing calls will not change the existing paperwork burden on sellers or telemarketers. It simply makes the TSR's existing prohibition explicit rather than imposing a new prohibition. Thus, the proposed amendment will, if anything, reduce the paperwork burden and the amount of time required for telemarketers to comply with the TSR." Call Command feels that the contrary is true in that the proposed prohibition will substantially increase the amount of paperwork burden on sellers and on telemarketers.

While the TSR does include a call abandonment prohibition, it does not expressly prevent prerecorded calls. Rather it limits the amount of call abandonment permissible pursuant to Section 310.4(b)(4) to a small percentage (i.e., 3%). Admittedly (and supporting the FTC's position), as a substantial number of prerecorded calls are made, the likelihood of violating the 3% rule increases. This is not to say, however, that prerecorded telemarketing calls are per se impermissible based on the existing TSR. Furthermore, the FCC's TCPA expressly permits prerecorded calls to consumers with whom an established business relationship exists.

Equally important, however, is the fact that prior to the FTC's Notice of Proposed Rulemaking in late 2004, industry had relied upon the FCC's position and the apparent notion that the FCC's more liberal position was the position being enforced in the industry. In addition, the FTC also published its intent to forbear enforcement of the call abandonment provision. Small businesses have relied on the preceding with the result that a change in the law will have a major impact and cause a substantial burden on the paperwork of sellers and telemarketers.

Call Command estimates that the costs to its clients who feel that targeted solicitation (as opposed to relationship driven marketing) will be necessary as a result of the proposed

prohibition on prerecorded telemarketing calls is estimated at ten times higher considering the fact that direct mail would likely become the medium for communication with consumers. This is coupled with the fact that direct mail marketing is not nearly as effective as voice marketing. Added to the preceding is the substantial costs and expenses that would be incurred to obtain express consent agreements from consumers. Call Command feels that these substantial costs could be avoided by imposing a less restrictive means to accomplish the FTC's objectives.

Call Command applauds the FTC for carefully balancing consumer and industry interests in its enactment of regulations pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"). In the CAN-SPAM final Rule, the FTC protects consumer privacy by giving e-mail recipients the right to opt out of receiving future commercial e-mail messages from a particular sender. The Rule does not prohibit any marketer from sending a commercial e-mail message to any recipient until the recipient submits an opt out request. The FTC reasonably and wisely requires certain opt out disclosures to be made by senders when they communicate by e-mail with consumers but puts the onus on the consumer to submit an opt out request. The result is that unwanted commercial e-mails are stopped by consumers one at a time. Thus the fit between the government's interest in protecting consumer privacy and industry's interest in communicating with consumers was satisfied by a narrowly tailored means. By analogy, Call Command asks the FTC to consider a similar "fit" in the case of regulation of prerecorded telemarketing calls, including fit between the government's interest in protecting consumer privacy with industry's interest in communicating with its customers.

The FTC and FCC rules governing telemarketing calls already impose substantial, but reasonable, restrictions on sending of calls to consumers, including calls sent by prerecorded message. Call Command believes that these restrictions adequately protect consumers, and this is evidenced by Call Command's substantially low opt out rates. Call Command understands that other companies in its industry that comply with the existing rules also enjoy substantially low opt out rates. This leads Call Command to the conclusion that a reasonable solution to consumer comments received by the FTC is more enforcement against those that violate the rules (along with a further safe harbor presenting a simple method for making DNC requests such as a push button) rather than punishment of the companies, such as Call Command, with excellent compliance records. Because reasonable rules already exist, Call Command resists a blanket prohibition on sending of prerecorded messages.

Because of the above reasons, Call Command respectfully requests that the FTC withdraw the proposed absolute prohibition on prerecorded telemarketing calls and reconsider promulgating a safe harbor that gives consumers the ability to opt out.

2. Provide guidance on the difference between a "telemarketing" call and an "informational" call.

Regardless of whether the FTC adopts the proposed prohibition on prerecorded telemarketing calls, Call Command respectfully requests the FTC to provide further guidance on the difference between “telemarketing” calls and “informational” calls.

Since the date that the FTC published its proposed prohibition on prerecorded telemarketing calls through the current date, Call Command continues to experience significant misconceptions in the industry that all prerecorded calls are impermissible. The FTC made abundantly clear that “informational” calls have never been regulated and can continue to be sent. Yet, unscrupulous competitors who offer other mediums of advertising continue to extract statements from the FTC’s recent Denial of Petition for Proposed Rulemaking indicating that all prerecorded calls are prohibited. This has caused substantial marketplace confusion. In addition, because Call Command desires to continue as a market leader in compliance, further clarification of “informational” calls is crucial.

3. Provide guidance on the manner of obtaining “express consent” if the proposed amendment to the call abandonment safe harbor is adopted.

Call Command asks the FTC to consider a less restrictive approach to obtaining a consumer’s express consent to receive prerecorded telemarketing calls. Call Command believes that an approach such as requiring the sender to be able to document a consumer’s intent to be called presents an alternative approach that still accomplishes the FTC’s objectives. The pending FTC proposal requires a separate written “agreement” from the consumer. While Call Command agrees with the premise of not sending a prerecorded call to a consumer unless the consumer desires to be called, requiring a written agreement will impose a substantial burden on Call Command and its customers. Call Command also requests the FTC to provide further guidance regarding the propriety of obtaining express consent by phone and via electronic means.

Call Command’s customers generally receive a consumer’s consent to be called by requesting that the consumer provide one or more phone numbers where the consumer can be called. This may be part of an application completed by the consumer or may be accomplished as part of a point of sale. In some cases it may be considered an “agreement” and in other cases it may be deemed an “acknowledgement.” As noted, Call Command’s experience indicates that consumers welcome the calls sent by Call Command’s customers. However, Call Command feels that to now separately contact each of the millions of consumers and request them to sign a written agreement that complies with the new proposal imposes a substantial time and cost burden on Call Command and its customers.

Call Command also requests the FTC to provide further guidance on the means that can be used to obtain express consent. Specifically, Call Command asks the FTC to confirm that both (i) a recorded telephone call where consent is given by phone and (ii) an electronic consent given by pushing a particular button on the consumer’s phone (i.e., press the number “4” key to give consent) each are sufficient methods of obtaining and providing consent. Additionally, Call Command requests the FTC to confirm that providing consent electronically such as in response

to an e-mail or by providing consent by clicking on a link established for that purpose on the internet are also sufficient methods of providing consent electronically.

With respect to consents obtained through e-mail and the internet, it is assumed that the answer is straight forward – i.e., such methods of consent are clearly considered written consents under the Federal E-Sign Act (“E-Sign”).

Call Command also requests the FTC to confirm in the TSR that obtaining consent by phone (whether recorded or via a push button that can be captured) is permissible or will be considered written consent. The FTC’s apparent goal of express consent is to substantiate a consumer’s intent to be called. Call Command believes that any method which can substantiate such intent should be permitted. With respect to E-Sign, however, Call Command asks that the FTC acknowledge in the TSR that a verbal consent is permissible.

The following excerpt from the Congressional Record does however support using voice data for signing purposes in other contexts:

Section 101c-6 does not preclude the consumer from using her voice to sign or approve that record. Proper voice signatures can be very effective in confirming a persons informed intent to be legally obligated. Therefore, the consumer could conceivably use an oral or voice signature to sign a text record that was required to be given to her ‘in writing.’ Moreover, the person who originated the text record could authenticate it with a voice signature as well. The spoken words of the signature might be something like ‘I Jane Consumer hereby sign and agree to this loan document and notice of interest charges.

146 Cong. Rec. S. 5281, 5284 (2000) (Abraham explanatory statement). It thus appears that consent given by phone satisfies E-Sign so long as the consent can be verified. Due to the potential for interpretation of the preceding, Call Command requests the FTC to provide guidance on this issue in support of obtaining express consent by phone.

4. If the proposed “express consent” requirement in Section 310.4(b)(1)(v) is adopted:

(a) amend the call abandonment prohibition in Section 310.4(b)(1)(iv) to clarify that the prohibition in 310.4(b)(1)(iv) does not apply to calls where “express consent” is obtained -

If the FTC elects to adopt its proposed requirement of express consent as described in proposed Section 310.4(b)(1)(v), it appears necessary to further state in the TSR that the call abandonment provision described in 310.4(b)(1)(iv) does not apply where express consent is obtained. Without such a modification, even if a sender of prerecorded calls had express written

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consents from all consumers who will receive the calls, the prerecorded message campaign would likely violate the maximum 3% of abandoned calls.

(b) provide industry with at least 18 months to obtain the express consent of its customers to receive prerecorded telemarketing calls due to the substantial burden such a new compliance requirement imposes on industry.

Because of the substantial burden placed on industry where businesses deem it appropriate to obtain express consent (see discussion above), Call Command respectfully requests the FTC to provide industry with 18 months to obtain said consents and to forebear enforcement of violations of call abandonment with respect to these consumers.

Call Command continues to support the FTC's efforts in this area. Should the FTC desire to discuss any of the above comments with Call Command, please feel free to contact Al Babbington, CEO, at 513-792-9212.

Respectfully submitted,

CALL COMMAND, INC

By: _

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